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ABSTRACT

The tensions that exist between the roles of the psychologist as a behavioral scientist and the lawyer as an advocate are examined in the context of Title VII litigation which brings these two professions into conflict in court. The Ethical Standards of Psychologists are contrasted with comparable but contradictory sections from the American Bar Association Code of Professional Responsibility. It is shown that while the behavioral scientist has been schooled in an environment where the preference is for cooperation, collaboration and committee work, the advocate is quite comfortable in an adversarial situation where conflicting viewpoints are sought as a basis for decision making. While the psychologist is deductive in his reasoning seeking to gain knowledge and explanations derived from broad generalizations, the advocate is inductive in his thinking about a particular factual situation. The implications of these conflicts are examined as they influence the roles assumed by the scientist and advocate in court. The legal language and legal procedure of a Title VII case are described and the implications of having case law define the future direction for the practicing industrial/organizational psychologist are briefly discussed. (Author)

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Influence of Lawyers, Legal Language and Legal Thinking *

Symposium: Federal Government Intervention in Psychological Testing: Is It Here?

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The views expressed in this paper are those of the author and do not necessarily represent the views of the EEOC.

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Mark Twain once said: "It is one thing to read that one should not carry a cat by the tail. But for one who has tried, the lesson is both vivid and not soon forgotten." One is tempted to borrow from Twain and begin with the observation: "It is one thing to read that one should not use unvalidated tests, but for those who do, the lesson may be both expensive and very trying."

In attempting to summarize the impact that lawyers, legal language and legal thinking have had on the contemporary practice of industrial psychology, three lines of reasoning will be developed. First, any attempt to understand the thinking of the lawyer in the role of an advocate would be blind without an insight into the professional ethics which govern the lawyer's conduct. The ethical canons of the attorney as advocate will be contrasted with those of the psychologist as an

applied behavioral scientist. Second, it is important that we begin as a profession to understand just how the judicial process influences the role we are increasingly being asked to assume in Title VII proceedings. Finally, an attempt to identify a number of implications of this interaction between the advocate and the behavioral scientist will be made for the practicing industrial/organizational psychologist.

Influence of Lawyers

If we begin with a broad look at the value systems in which behavioral scientists and lawyers are schooled, we can begin to identify the nature of the tensions that exist in an adversarial proceeding. Citing first from the Ethical Standards of Psychologist:

> The psychologist, committed to increasing man's understanding of man, places high value

> on objectivity and integrity...and publishes full reports on his work, never discarding without explanation data which may modify the interpretation of results. (p.1)

The advocate as will be shown is not similarly constrained in presenting the full pattern of facts in any case. More likely the advocate may try to discredit the findings and conclusions of the psychologist using the very data the psychologist is ethically obliged to report.

Citing further from the Ethical Standards of Psychologists:

> Modesty, scientific caution, and due regard for the limits of present knowledge characterize all statements of psychologist who supply information to the public, either directly or indirectly. Psychologists who interpret the science of psychology ... to

> the general public have an obligation to report fairly and accurately. Exaggeration, sensationalism, superficiality, and other kinds of misrepresentation are avoided. (p.2)

More generally stated, the psychologist as a behavioral scientist seeks broad principles of human behavior that improve upon his ability to predict the behavior of others. It is often difficult for a person so trained to give unequivocal yes/no answers when answering an interrogatory or deposition in a given case.

The role of the psychologist as a behavioral scientist can best be summarized with the following points:

1) Uncompromising in seeking truth;
2) Deductive in his reasoning seeking to gain knowledge and explanations derived from broad generalizations;

3) Motivated by need to explain and predict;

4) Impatient with yes/no, right/wrong answers;

5) Difficulty in representing findings given professional constraints of judgment, caution, and modesty.

Citing from the American Bar Association Code of Professional Responsibility, the seventh canon of that code admonishes the lawyer to represent his client zealously within the bounds of the law - whatever he perceives those bounds to be.

> A lawyer should represent a client zealously within the bounds of the law ... The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations.

The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent. (p.24c) Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or advisor. A lawyer may serve simultaneously as both advocate and advisor, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them...While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. (p.24c)

> The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or supportable by a good faith argument for an extensive modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous. (p.24c)

Furthermore, according to an interpretive American Bar Association opinion:

> The lawyer ... is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. ... His personal belief in the soundness of his cause or of the authorities

supporting it is irrelevant. (p.24c)

There is an obvious tension between the roles of the psychologist and the advocate in an adversarial setting. While the behavioral scientist has been schooled in an environment where the preference is for cooperation, collaboration and committee work, the advocate has been schooled to be quite comfortable in an adversarial situation where conflicting viewpoints are sought as a basis for decision making. For the behavioral scientist who is most comfortable with generalizations and statements of probabilities, there will always be a certain discomfort with any given fact situation requiring a definitive opinion.

The role of a lawyer as an advocate can best be summarized as follows:

1) Advocates most favorable "theory of law" to further his client's interests;
2) Inductive in his thinking in dealing with

a particular fact situation;

3) Motivated by desire to win (gain favorable decision);

4) Demands yes/no, right/wrong answers;

5) Impatient with tentative nature of behavioral research and takes advantage of differing opinions to advantage of client.

In some ways, industrial/organizational psychology today is where psychiatry was 100 years ago when the M'Naghten rule was passed. In the 1850's society recognized that there was a problem in handling offenders who did not have the competence to tell the difference between right and wrong. The courts sought out the medical profession assuming the psychiatrist could help them distinguish between those individuals who could tell right from wrong and those who couldn't. Psychiatry was placed in the position of answering the question: Does the

offender know that what he did was wrong? Psychiatry was being asked a question by the court for which it had no training and it has taken over 100 years for them to grapple with the answer. I'm not sure even today that they have answered it.

More recently society had and continues to have a problem identified as employment discrimination. It was not 100 but more like 10 years ago that the courts sought out those experts who professed to be able to distinguish between those who could do the jobs and those who couldn't. Because of the legal construction of discrimination, which we will examine in a moment, attention was given by the courts to employment practices which <u>adversely affected</u> classes of individuals protected by Title VII. Society has challenged psychologists to reduce, if not eliminate, these adverse practices. Until we take the challenge seriously, our day in

court is virtually assured.

Legal Language

The key to understanding how legal concepts affect our profession is to understand how the lawyer and the court define discrimination. That definition involves selection procedures which adversely affect members of classes covered by Title VII.

In a Title VII case, a charging party alleges that he or she is aggrieved as the result of an unlawful employment practice. When a charging party files suit, that person assumes the legal status of a plaintiff--the person who initiates litigation. The respondent is that person against whom an administrative charge of discrimination is filed. Should a lawsuit be filed, the respondent takes on the legal status of a defendant--the person being sued.

An affected class is a group of similarly situated persons and with respect to Title VII, any person may potentially be the member of an affected class. A complaint is the first paper filed by the plaintiff to initiate a lawsuit which states who the parties are, describes the nature of the charge and requests relief. The answer is a response by the person who is sued either admitting or denying in part or in whole allegations in the complaint and offering some defense to the charge. A summary judgment could be issued by the court at this point where there is no dispute of material facts, i,e., there are no facts offered by the defense to try and disprove, hence there is no need for a trial. A conciliation is a settlement through administrative processes such as those initiated by EEOC and is a means by which a case is settled by resolution of charges without a trial. A consent decree by comparison is the judicial counterpart to conciliation and is a formal court document approved by a judge.

Certain conduct by an employer such as refusing to hire women or maintaining segregated facilities is called a per se violation for which there is no defense. But the typical situation is a prima facie violation where evidence is shown that an employment practice has an adverse impact affecting an individual as a member of a similarly affected class covered by Title VII. The significance of a prima facie case is that it shifts the burden of proof to the defendant and if the defendant fails to answer the charge, the judgment is awarded to the plaintiff.

Discovery is the legal term for the investigation phase after a complaint is filed and the defendant has answered. Discovery includes: 1) Interrogatories--written questions with a prescribed time period to answer; 2) depositions--an oral interrogation of a witness in front of a court reporter; 3) requests for production of documents;

and 4) requests for admission of fact--where, upon the presentation of a document such as a published set or norms, the question is asked as to its authenticity, accuracy, etc.

Bench trial follows discovery by both parties and is always before a judge in Title VII proceedings and never before a jury. The plaintiff attempts to establish a prima facie case by demonstrating that an employment practice had an adverse impact and assuming the plaintiff meets this burden of proof, the defendant attempts to rebut it, i.e., offers a validation study. The plaintiff in addition to establishing the prima facie case may also attempt to discredit the defendant's validation study.

An expert witness is qualified by credentials which generally include at least a MS in psychology and experience in the field and may additionally

include publications and teaching. If an expert witness is qualified to the court's satisfaction, that person may offer his or her professional opinion as to what others have done. A bench trial is more informal than a jury trial and the judge is more likely to allow the non-expert witness to offer opinions other than those related to facts with which he has had first-hand experience.

At the conclusion of the trial, the judge makes findings of fact where he serves as an umpire and "calls them as he sees them" or as he understands the facts to be. He then applies to the findings of fact the applicable law as he understands it, and renders a decision. The decision generally goes one of two directions. The judge may either dismiss the case if a violation of Title VII is not proven or issue an injunction. The injunction may either require that a certain practice be stopped or that something be done in the future. It may also

order other actions such as relief to affected class members making whole in the award of back pay what they would have received but for the effects of the unlawful practice.

Now what does all of this legal thinking and legal language have to do with the practicing industrial/organizational psychologist? Plenty! The standard to evaluate the psychologist's service may no longer be what the client organization will buy but what the court will "buy". It is my opinion that as long as the members of this division of APA sit back and consider EEOC the adversary, the current trend in which fewer and fewer organizations are testing is likely to continue. It is possible to foresee the day when only the public sector which is required by law and those few blue-chip corporations who can afford the staff support will be the

ones using objective selection procedures.

If the findings of our validation efforts are so tenuous (with due regard for the cautions of scientific modesty) that the plaintiff's expert witness can discredit our efforts with ease, either we have failed as professionals to educate the court as to what validation is all about or our validation efforts have failed to establish much. One need look no further than the recent Moody v. Albemarle decision to get my point. In most cases our failings fall on both sides of the bench: we have failed to educate the court and our findings have far too often been tenuous.

To those who would reply that the structure of Title VII proceedings brings only findings which are tenuous to the court's attention, one must admit this is true. Unfortunately for the personnel manager whose tests are being examined by OFCC or EEOC,

no news is in fact good news. It is in this context however, that it may become increasingly difficult to even consider testing unless we as a profession do a better job of educating the public as well as the court. Least you fail to get the point about educating the court, see for yourself what a judge in Chicago had to say in U. S. v. City of Chicago involving tests:

> The defendants have chosen to lead the court 'deep into the jargon of psychological testing.' The result has been a virtual morass of competing theories advanced by professional testers or tests in which the debate has centered on predictive, concurrent, criterion and construct validation and the court has been left with the unwelcomed task of testing the testers. It is not amiss to observe that plaintiffs have not shunned the debate.
> (8 EPD 9785)

While it is important to understand the adversarial system described in this paper, Division 14 should not be tempted to rush to the bench and try to beat the lawyer on his home court, case by case. That would be counter to our efforts to develop the broad principles we seek to achieve as behavioral scientists.

The answer lies in doing what traditionally the industrial/organizational psychologist knows best: testing and training. It may not be too late to recover the practice of testing and test validation from the more and more confining legal precedents. Our efforts have only begun with the publication of the Division 14 Standards, which have been most helpful in educating attorneys as well as providing guidance to those of us drafting the Uniform Guidelines. We have not only the court to educate but the typically misinformed personnel

manager who may already have gien up hope of getting any help from the psychologist in meeting the goals of equal employment opportunity by using objective selection procedures.

Implications

Our work in the hopefully not too distant future should be in five major areas:

First, since the public sector fully intends to bank on construct validity, this Division needs to provide a forum for feedback and consensus in developing this as yet unproved validation strategy for employment purposes. Certainly we can expect to see a revival of efforts to more fully describe and understand means of quantifying judgmental decision-making strategies such as synthetic validity and job element examining.

Second, it appears that more guidance on questions of experimental design could be used, especially when we continue to see cononical

correlation without cross-validation, discriminant analysis and a morass of admittedly complex and contradictory models of test fairness. We simply cannot wait, as one authority recently suggested, to see what the courts to with this complex and contradictory area!

Third, we can at a minimum expect to see a Content Validity III conference with particular attention directed to developing and documenting professional consensus. It might be expected that some day in the near future, this Division will be asked for guidance in the applicability to content validity to licensing and certification.

Fourth, a great deal of litigation in the future is likely to revolve around a rather simple question: When is job analysis a job analysis? The answer to this question will pay huge dividends to the user of construct validation.

Finally, we must recognize the final suggestion as obvious - the question of validity generalization. We must begin to more thoroughly build on the efforts of Ghiselli (and more recently McCormick and Fleishman) in systematically describing what it is that we are measuring and when and for what job/duties/tasks we are finding it. Perhaps the idea of the Validity Information Exchange was just a decade ahead of its time.

None of the roles described should be seen as comfortable for any of us. The risk to a respondent's expert witness is that but for a lesser degree of scientific caution, a case might have been won. The risk to the plaintiff's expert witness is and will probably contine to be the scorn of his "organizational peers". But more

importantly in my opinion, the risk of doing nothing is having our practice increasingly defined by the court. If this is your idea of practicing as an applied behavioral scientist, then just sit back and watch the advocates usurp the prerogatives of your profession.

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